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IN THE

Supreme Court of the United States

October Term, [redacted] 1970

No. [redacted] 259

KENNEDY BOOK STORE, INC., ----------Petitioner,

versus

DEPARTMENT OF REVENUE;
DEPARTMENT OF REVENUE, EX REL. JAMES E. LUCKETT, Commissioner of Revenue;
JAMES E. LUCKETT, Commissioner of Revenue; and
KENTUCKY BOARD OF TAX APPEALS, ----------Respondents.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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No. 1691

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versus

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QUESTION PRESENTED

Respondent is not satisfied with Petitioner's statement of the question presented. Simply stated the question presented is as follows:

Whether the Fourteenth Amendment to the Federal Constitution which requires a state to grant equal protection of the laws to any person within its jurisdiction entitles a corporation operating a private bookstore for profit to the same tax treatment as a competitive college bookstore operated by an agency of the Commonwealth of Kentucky.

COUNTERSTATEMENT OF THE CASE

The Petitioner, Kennedy Book Store, Inc., has operated an "off campus" college bookstore across the street from the University of Kentucky in direct competition with the "on campus" bookstore operated by the University of Kentucky. Kennedy Book Store, Inc., (hereinafter referred to as "Kennedy") is privately owned and operated for profit. The University of Kentucky bookstore is operated by the University of Kentucky, which is a public educational institution owned by the Commonwealth of Kentucky. Needless to say both the Commonwealth of Kentucky and the University of Kentucky are nonprofit institutions, but the bookkeeping records did show a profit for the University bookstore during the period in question.

Kennedy has not and does not claim that it is exempt from the sales tax imposed by the Commonwealth under any constitution or statutory provision of Kentucky or under any regulation promulgated by the Department of Revenue of the Commonwealth of Kentucky. It merely contends that the Commonwealth of Kentucky by means of its tax policies cannot operate a college bookstore in a manner that results in a competitive advantage over Kennedy. Having failed to obtain tax relief from the duly constituted administrative agencies and the courts of the Commonwealth it now seeks relief from the United States Supreme Court on the theory that the rights accorded to it under the Fourteenth Amendment to the Federal Constitution are being violated. Kennedy contends that the relief to which it is allegedly entitled can be accomplished by either (1) requiring the University of Kentucky to pay sales tax or (2) by exempting Kennedy from paying sales tax.

REASONS FOR DENYING THE WRIT

I.

The Fourteenth Amendment Guarantees Equal Protection of the Laws Only to Persons of the Same Class. Kennedy and

the University of Kentucky Are Not Persons of the Same Class.

The Department of Revenue, throughout the course of this litigation, argued that the University of Kentucky is exempt from the payment of sales tax by virtue of Section 170 of the Kentucky Constitution. Kennedy did not take issue with this contention. The Kentucky Court of Appeals took note of this fact in the instant case, Ky., 450 SW2d 524 (1970) at page 526 stating as follows:

> "In taking this approach Kennedy *assumes* as does the Department, that UK is an exempt vendor because of Section 170 of the Kentucky Constitution." (Emphasis by the Court).

The pertinent part of Section 170 of the Kentucky Constitution in reference to exemptions from taxation reads as follows:

> "There shall be exempt from taxation . . . institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education . . . ."

If the Kentucky Constitution provides an exemption to the University of Kentucky without providing a similar exemption to Kennedy, such exemption granted to the University establishes a valid classification for the purpose of taxation and does not violate the Fourteenth Amendment to the Federal Constitution. Kennedy is a privately owned corporation operated for profit. The University of Kentucky, on the other hand, is a nonprofit institution of higher learning operated by the Commonwealth of Kentucky.

In reference to the classification of subjects of taxation this Court in the case of *State Bd. of Tax Commissioners* v. *Jackson*, 283 U. S. 527 (1931), beginning at page 537 stated as follows:

> "The principles which govern the decision of this cause are well settled. The power of taxation is fundamental to the very existence of the government of the

states. The restriction that it shall not be so exercised as to deny to any the equal protection of the laws does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings, or occupations. Bell's Gap R. R. v. Pennsylvania, 134 U. S. 232, 10 S. Ct. 533, 33 L. Ed. 892; Southwestern Oil Co. v. Texas, 217 U. S. 114, 30 S. Ct. 496, 54 L. Ed. 688, Brown-Forman Co. v. Kentucky, 217 U. S. 563, 30 S. Ct. 578, 54 L. Ed. 883. The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 21 S. Ct. 43, 45 L. Ed. 102, or if any state of facts reasonably can be conceived to sustain it. Rast v. Van Deman, 240 U. S. 342, 36 S. Ct. 370, 374, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455; Quong Wing v. Kirkendall, 223 U. S. 59, 32 S. Ct. 192, 56 L. Ed. 350. As was said in Brown-Forman Co. v. Kentucky, supra, at page 573 of 217 U. S., 30 S. Ct. 578, 580:

"'A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses, or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.'

"It is not the function of this Court in cases like the present to consider the propriety or justness of the tax, to seek for the motives, or to criticize the public policy which prompted the adoption of the legislation. Our duty is to sustain the classification adopted by the Legislature if there are substantial differences between the occupations separately classified. Such differences need not be great. The past decisions of the Court make this abundantly clear."

The Petitioner's contention that it is entitled to the identical treatment accorded the University of Kentucky would have merit if it were a person of the same class as the University, but obviously it is not. As stated above Kennedy is a privately owned corporation operated for profit. The University of Kentucky is a nonprofit educational institution operated by an agency of the Commonwealth of Kentucky. The Commonwealth has properly assumed the duty of providing for its citizens institutions of higher education. The tax exemption granted to institutions of education by Section 170 of the Kentucky Constitution relieves the taxpayers of the Commonwealth from a portion of the burden of supporting such institutions. This constitutional exemption from taxes is clearly a reasonable one. The resulting difference in classification for tax purposes between the privately owned Kennedy bookstore and the state owned bookstore is neither capricious nor arbitrary. The classification involved herein is based on reasonable distinctions and thus there is in this case no denial of equal protection of the laws.

II.

The Equal Protection Clause of the Fourteenth Amendment Does Not Protect Kennedy From Injurious Competition by a Tax Exempt Agency of the Commonwealth of Kentucky.

Assuming, without admitting, that the Kentucky Department of Revenue has the power and authority to grant Kennedy relief from the sales tax, the department has not contravened the Fourteenth Amendment to the Federal Constitution by its refusal to do so. The equal protection clause does not forbid discrimination with respect to things that are different or prohibit competition from an exempt agency of the sovereign. The Kentucky Constitution grants an exemption to the University of Kentucky. At the time this dispute arose there was no constitutional, statutory or administrative exemption granted to Kennedy (the Kentucky Legislature in 1970 did provide statutory relief for Kennedy).

This question was settled by this Court in the case of *Puget Sound Power and Light Company* v. *Seattle*, 291 U. S. 619 (1934). Mr. Justice Stone, speaking for the Court beginning at page 623, stated as follows:

> "There is no contention that appellant's franchise or any contract relieves it generally from the duty of paying taxes. It is not contended that a state or municipality, merely because it fails or is unable to tax its own property or business, is prohibited from taxing like property or business. The contention here is that constitutional limitations are transgressed only because the tax affects a business with which the taxing sovereign is actively competing. For that reason it is argued that the taxation involves a forbidden discrimination and deprives appellant of its property without due process since the combined power of the city to tax and to compete may be used to destroy appellant's business. As appellant asserts that the tax can impose no effective burden on the city, its contention is, in effect, that the city, by virtue of the Fourteenth Amendment, upon entering the business forfeited its power to tax any competitor.
>
> "In conducting the business by state authority the city is exercising a part of the sovereign power of the state which the Constitution has not curtailed. The decisions of this Court leave no doubt that a state may, in the public interest, constitutionally engage in a business commonly carried on by private enterprise, levy a tax to support it, Green v. Frazier, 253 U. S. 233, 64 L. ed. 878, 40 S. Ct. 499; Jones v. Portland, 245 U. S. 217, 62 L. ed. 252, 38 S. Ct. 112, L.R.A.1918C, 765, Ann. Cas. 1918E, 660, and compete with private interests engaged in a like activity. Standard Oil Co. v. Lincoln, 114 Neb. 245, 207 N. W. 172, 208 N. W. 962, affirmed per curiam 275 U. S. 504, 72 L. ed. 395, 48 S. Ct. 155, supra; Madera Waterworks v. Madera, 228 U. S. 454, 57 L. ed. 915, 33 S. Ct. 571; Helena Waterworks Co. v. Helena, 195 U. S. 683, 47 L. ed. 245, 25 S. Ct. 40.
>
> "We need not stop to inquire whether the equal

protection clause was designed to protect the citizen from advantages retained by the sovereign, or to point out the extra-ordinary implications of appellant's argument when applied to expansions of government activities which have become commonplace. It is enough for present purposes that the equal protection clause does not forbid discrimination with respect to things that are different. The distinctions between the taxing sovereign and its taxpayers are many and obvious. The private corporation, whatever its public duties, carries on its business for private profit and is subject to the obligation, common to all, to contribute to the expense of government by paying taxes. The municipality, which is enabled to function only because it is a tax gatherer, may acquire property or conduct a business in the interest of the public welfare, and its gains if any must be used for public ends. Hence equal protection does not require a city to abstain from taxing the business of a corporation organized for profit merely because in the public interest the municipality has acquired like property or conducts a like business.

"These differences are not lessened nor the constitutional exaction of uniformity increased because the city competes with a business which it taxes."

This Court noted in the above case that equal protection of the laws does not forbid discrimination between things that are different and that the distinctions between the taxing sovereign and its taxpayers are many and obvious. It may also be stated that the distinctions between the sovereign operating a bookstore as part of a nonprofit state university and a private corporation operating a bookstore solely for profit are many and obvious.

If exemption from sales tax grants the University of Kentucky an unfair advantage over Kennedy within the purposes and intent of the Fourteenth Amendment, such logic would also require the University to pay state income tax and state and local ad valorem property taxes on its bookstore operation just

as Kennedy must pay such taxes. This course of reasoning would also require that such additional taxes be imposed upon non-profit colleges teaching courses in shorthand, typing, accounting, business law and similar subjects in order to protect private business colleges operated for profit from unfair competition. Needless to say, it is well settled that the Fourteenth Amendment does not require such equal tax treatment.

CONCLUSION

For the reasons stated above, certiorari should be denied.

Respectfully submitted,

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CERTIFICATION:

I hereby certify that on this 2d day of July, 1970, a copy of this Brief in response to Petitioner's petition for writ of certiorari was mailed to each counsel for Petitioner.

William S. Riley

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